No. 21782 and 21782-A

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

SAMUEL REISMAN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

**Appeal From the United States District Court,
Central District of California.**

REPLY BRIEF OF APPELLANT.

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Preliminary Statement.

The government alleges that appellant's opening brief contains a statement of facts "consisting almost entirely of Reisman's testimony and that of witnesses favorable to him." (Govt's Br. 3.) The government also complains that appellant's statement of facts is only eight pages long and therefore submits a "brief statement of facts." (Govt's Br. p. 3.) This "brief" statement then begins; it ends 45 pages later. It is in no sense a statement of *facts*. It is an *argument* of the prosecution's case. Examples of some of the allegations characterized as "facts" are: "the so-called 'development program' of the company was merely a promo-

tional gimmick" (Govt's Br. p. 29); "D. *DECLINE AND FALL.* The technique used by appellants in selling their land was to talk about and picture features in isolated spots to the north of what they said was a 53 mile long ranch . . . and to sell desert land at the south". (Govt's Br. p. 37.) This "statement of facts" bears a remarkable similarity, in its tone and selectivity, to the prosecutor's final argument at the trial. It is grossly distorted and patently unfair.

Ninth Circuit Rule 18(c) provides that an appellate brief is to contain "A *concise* statement of the case, presenting the *questions involved.* . . ." (Emphasis added.) The government's lengthy statement and appendices are designed to divert the attention of this Court from the important questions of law raised by appellant. Appellant does not argue the sufficiency of the evidence in this appeal. Nor does appellant admit that the evidence is sufficient to sustain a conviction. But appellant recognizes that this Court does not preside over a trial *de novo.* As in *Phillips v. United States,* 356 F. 2d 297 (9th Cir. 1965), the errors of law committed throughout this long trial require reversal quite apart from the question of sufficiency of the evidence. Appellant will therefore not oblige the government by re-arguing its factual case on appeal. The facts relating to each question of law raised by appellant are presented in detail under each separate heading. These are the facts with which we are here concerned.

ARGUMENT.

I.

THE IMPROPER ADMISSION IN EVIDENCE OF COMPLAINT LETTERS, AND THE COURT'S ERRONEOUS INSTRUCTIONS CONCERNING THE PURPOSE FOR THEIR ADMISSION, CONSTITUTE REVERSIBLE ERROR.

The government's brief misstates appellant's contentions regarding the failure of the trial court to comply with the requirements for the admission in evidence of complaint letters under *Phillips v. United States,* 356 F. 2d 297 (9th Cir. 1965). Appellant's three contentions are first set out in pages 11 and 12 of the opening brief and again in major headings A, B, and C of argument number I. The three points are:

> (1) The trial court did not make the necessary preliminary finding that appellant had actual, personal knowledge of the complaint letters;
>
> (2) The evidence is insufficient to show that appellant had actual, personal knowledge of the complaint letters;
>
> (3) The court erred because it did not admonish the jury that complaint letters could be considered against appellant only if independent evidence showed he had actual, personal knowledge of such letters.

The government ignores point (1) altogether. (Govt's Br. p. 49.) And the government's arguments regarding points (2) and (3) are without merit.

(1) The Court Did Not Make the Necessary Preliminary Determination That Appellant Had Actual, Personal Knowledge of Complaint Letters.

The *Phillips* case holds that where complaints are admitted on the theory that a defendant's actual knowledge of them shows that he must have realized the scheme was fraudulent,

> ". . . the trial court should also, at the time the documents are offered in evidence, make a preliminary determination as to whether there is prima facie evidence showing such actual knowledge. Lacking such prima facie showing, the documents should not be admitted. No such preliminary determination was made in this case." (356 F. 2d at 306, n. 8.)

No such preliminary determination was made in the present case. Here the complaint letters were received in evidence because the court thought they were business records under 28 U.S.C. §1732. The court's position, repeated throughout the case, was:

> "If there was testimony these were kept in the normal course of business I will allow them in." [R. T. 5957-5958.]

No other foundation for admission of the letters was required. The letters were erroneously admitted as business records. (*Phillips v. United States, supra,* 356 U.S. at 307.) And because the court received the complaints as business records it did not make the necessary preliminary determination that appellant had actual, personal knowledge of the letters. The court was not concerned with personal knowledge. The court

asked only whether the letters were "kept in the normal course of business." [R. T. 4443.] According to the court, "That would be the question." [R. T. 7512.]

The government's brief makes no mention of the court's failure to make the preliminary determination. This Court may therefore assume that the government concedes the error.

(2) The Evidence Is Insufficient to Show That Appellant Had Actual, Personal Knowledge of the Complaint Letters.

The government's argument apparently is that because appellant had *general knowledge* that refund requests and complaints were being made, he had *actual, personal knowledge* of each claim of fraud admitted against him. This attempt to avoid the holding of the *Phillips* case cannot succeed. In *Phillips* the complaint letters were sent to an escrow company. One of the defendants, an attorney, set up the procedure to be followed by the company in processing the letters. An employee of the escrow company "sent a daily report of sales and inquiries" to three of the defendants. One defendant actually asked that some letters be sent to him. But the important point is that neither he nor the other two defendants had seen the complaints that were admitted in evidence.

> "There is no direct evidence that Phillips or Walker had *seen* any letters of this kind, or that any of the appellants had *seen* the coupons and requests comprising exhibit 984." (356 F. 2d at 303. Emphasis added.)

Although the defendants in *Phillips* had general knowledge that complaints were being received by the

escrow company, this Court reversed the conviction because the defendants did not have personal knowledge of the *particular complaints admitted against them.* The Court noted:

> "[T]he trial court stated that the evidence showed that 'some' of the defendants were in charge of the escrow office and that some of the letters were specifically addressed to 'some' of the defendants. There were seven defendants and the court did not indicate whether it included any of the three appellants among the 'some' defendants to which the court referred. Examination of the documents contained in these two exhibits demonstrates that none of the letters and requests were addressed to any of the appellants." (356 F. 2d at 306, n. 11.)

Of course, none of the complaint letters were addressed to appellant in this case. And there is no evidence that appellant saw any letters but the thirteen he reviewed. The government says "Reisman also told Secretary Manzin to notify him of complaints which came in and she did so." (Govt's Br. p. 53.) The statement is a distortion of appellant's testimony. The uncontradicted evidence shows that appellant reviewed only thirteen complaint letters. The government's statement refers to appellant's testimony that in September, 1961 he asked to be notified of complaints. [R. T. 13,184-13,185.] But the government omits the preceding sentence of the transcript in which appellant testified that the thirteen letters "right in front of me are the sum total" of the complaints he saw. [R. T. 13,184.] The government betrays the weakness of its position by its attempt to show that appellant had personal knowledge of complaints because he "kept in touch" with

Nevada attorney McDonald. (Govt's Br. p. 53.) McDonald actually received and responded to complaint letters. He was retained by the company for that purpose. There is no evidence that appellant saw or discussed with McDonald a single one of these letters. But the government's claim that appellant had personal knowledge of complaints reviewed by McDonald is a new one. The government's real position, the position it took at trial, is that *McDonald's personal knowledge was imputed to appellant.* The prosecutor told the court that the letters reviewed by McDonald "are offered by us, your Honor, to show number one, that the statement was made *to the company* and therefore *they had notice* a complaint was made. [R. T. 7517. Emphasis added. Exs. 3-2051, 3-2060, 3-2059-A, 3-2063, 3-2057, 3-2047, 3-2062, 3-2063, 3-2044, 3-2048, 3-2049, 3-2053, 3-2054, 3-2056. Admitted, R. T. 7528.] The court agreed with the government's constructive notice theory.

> "The Court: Yes, but if he [McDonald] was acting at the instructions of the company, why, it seems to me he is then acting *as an agent,* unless you have some authority to the contrary . . . The *whole question is whether the attorney is the agent of the company* and when the company employs him to answer complaints, it seems to me *they are bound by the notice he receives.*" [R. T. 7514-7515. Emphasis added.]

The government seeks to impute the knowledge of attorney Ross to appellant because several letters concerning complaints were signed by Ross "for Reisman". (Govt's Br. pp. 53-54.) The government found a total of four such letters. [Exs. 2-1226-B, 2-1266-C, 1-545,

1-578.] There is of course no evidence that appellant saw even these letters. Ross handled about 269 complaints and ten or twelve lawsuits brought by purchasers. [R. T. 11,248-11,251; Exs. ER; *e.g.* Exs. 3-415 to 3-550; some examples are collected in Appendix B to Appellant's Opening Brief.] The government makes no mention of the hundreds of complaints answered by Ross in his own name. [See, *e.g.,* Exs. 3-1 through 3-552 containing many complaints answered and handled by Ross.] The government claims that appellant had personal knowledge of complaints handled by Ross because the letters "were available to Riesman in Ross' office." (Govt's Br. p. 54.) This Court was not impressed by "availability" evidence in the *Phillips* case. There this Court held that the evidence was insufficient to show personal knowledge of letters although they were processed in an escrow company set up by one defendant; all defendants obviously had access to the company files; all cancellation letters were kept in the office files; the defendants received a daily report of sales and inquiries and a weekly report of cancellations; and forty or fifty complaint letters were actually sent to one defendant. In this case Ross was retained to handle complaints and was entirely independent of appellant. There is no conflict in this testimony. [R. T. 11,151, 11,165, 11,247-11,251.] And the government's brief is silent about the complaints reviewed by attorney Finell in early 1962. The government does not even speculate that appellant had access to Finell's files. Nonetheless, the government asks this Court to find, on the basis of no evidence, that appellant had actual, personal knowledge of all complaints admitted in evidence.

The government's argument is that appellant had actual, personal knowledge of every complaint letter admitted against him. It is of no consequence to the government that (1) the uncontradicted evidence shows that appellant saw only thirteen complaint letters; (2) there is absolutely no evidence that appellant saw any of the hundreds of other letters admitted against him; (3) at all times after January, 1962, complaint letters were being reviewed and processed by a specifically designated person other than appellant; (4) there is a total lack of evidence that anyone assigned to review complaints either showed them to appellant or consulted him concerning the letters; (5) none of the letters were addressed to appellant; and (6) there is no support in the evidence for the government's charge that appellant rifled the files of other lawyers.

All the evidence shows that appellant did not have personal knowledge of any letters but the thirteen he reviewed. The admission of the hundreds of other letters against appellant was prejudicial error and requires reversal.

(3) The Court's Erroneous Instructions Regarding Complaint Letters Require Reversal.

Appellant in his opening brief quotes many of the admonitions given by the court concerning the purpose for which complaint letters were admitted. All of these instructions violated the principles established by this Court in the *Phillips* case. But there is not one word about them in the government's brief. The instructions were so manifestly erroneous that the government does not even suggest that these instructions, given on the vital issue of appellant's intent, were correct. Instead, the government now argues for the first

time that the complaints "were admissible for several other purposes." (Govt's Br. p. 55.) In other words, the government argues that the complaints were "*admissible*" for purposes other than those for which they were in fact *admitted*.

The question at this stage of the proceedings is not how many theories the government can devise to justify the erroneous admission of evidence. It does appellant no good to hear the government say now that it has a *new theory* after the jury has considered the evidence on the *wrong theory*.

The government belatedly contends that complaint letters were "admissible as the documents in response to which lulling letters were sent (Govt's Br. 55), and "to rebut the defense contention that virtually all complaints were made after January, 1962 and were prompted by adverse publicity." (Govt's Br. p. 56.) The government of course knows that the so-called "lulling letters" were not sent in response to all customer complaints. In fact, they were not sent to the customers who sent letters containing the most prejudicial allegations of fraud. In January, 1962 attorney Finell established the policy of refunding money to purchasers who claimed the land had been misrepresented. [R. T. 12,599-12,603.] The letters characterized by the government as "lulling letters," correctly telling customers that the company intended to develop the land, were not sent to purchasers who claimed misrepresentation. They were sent only to purchasers who wanted to rescind their contracts because they had changed their

minds and no longer wanted the land, or because they had financial or other problems. And the government is not sincere in contending that the complaint letters were "admissible" to rebut the defense contention that complaints were prompted by adverse publicity in January, 1962. In the first place, the defense contention was correct. A quick review of some of the letters in Appendix A to appellant's opening brief removes all doubt that these letters were sent in response to news articles and television announcements incorrectly stating that the company would give refunds to all purchasers. The authors of these letters say they are writing because of the publicity. And of course if the government merely wanted to show when the letters were sent it could have done so without introducing the highly inflammatory contents of the letters.

The truth is that the government offered complaint letters for one purpose only: to prove that someone in the company knew of the complaints and that therefore the defendants had criminal intent. They were offered for the same purpose that the letters in the *Phillips* case were offered. The prosecutor made his position plain throughout the trial. On one occasion he said, in the presence of the jury:

> "Mr. Nissen. May I state for the record, your Honor, that anything that is a statement of someone else, reported to Gamble Ranch or to any of their personnel, *is offered for this reason:*
> "To show that the information *was so reported and that Gamble had that information in their file.*"
> [R. T. 4834 Emphasis added.]

At another time, the prosecutor told the court:

> "Mr. Nissen: They [complaints] are offered by us, your Honor, to show number one, that the statement was made *to the company* and therefore *they had notice* a complaint was made.
>
> The Court: That is right.
>
> Mr. Nissen: That is the reason." [R. T. 7517. Emphasis added.]

All complaint evidence was offered by the government on the issue of the defendants' intent and for no other purpose.

> "Mr. Nissen: . . . You see, what we are calling these witnesses for is *intent.* If, say, five or six witnesses in a row understood the Dukane film strip to say something and they went up there and saw it was not as the film strip said, and perhaps *complained to the company,* as we think these witnesses will show, complained to Mr. Benearon's, Byrnes' and Reisman's *representatives*—in fact, *some* of the complaints even being referred *perhaps* to them then *you have notice* these things aren't right." [R. T. 2300-2301. Emphasis added.]

It is too late for the government to claim that complaint letters were "admissible" on newly created theories. They were offered to show intent. The government hoped to prove intent constructively. In the statement quoted above the prosecutor admitted that all complaints were not seen by appellant. He said "*some* of the complaints" were "*perhaps*" referred to appellant. But even more important than the prosecutor's theory in offering the complaint letters are the court's

admonitions to the jury as to how the complaints were to be considered. The jury considered the letters on the question of appellant's intent because the court repeatedly told them to do so. At no time did the court tell the jury that complaints could be considered for any of the reasons now urged by the government. A typical instruction was as follows:

> "The complaints are relevant on the issue of the defendants' *intent* and *good faith.*
>
> "If the defendants knew that people were being misled by solicitation literature and salesmen's representations and continued the same operation with this knowledge, this is a matter that the jury may consider in determining whether the defendants or any of them had any *intent to defraud.*" [R. T. 6031-6032. Emphasis added.]

The court gave many similar instructions as complaint letters were received in evidence.

> ". . . you can consider it [a complaint] in considering the information the company had relative to complaints and *intent.*" [R. T. 8943. Emphasis added.]
>
> ". . . you can consider it [a complaint] in relation to the *question of intent* on the part of the defendants." [R. T. 8867-8868. Emphasis added.]
>
> "Now these [complaint letters] are offered, as I have already told you, I think on more than one occasion, not for the truth of the facts set forth in the complaints but to show as evidence of the fact that these complaints were called to the attention of the defendants, and *the jury is to consider them as to the intent of the defendants* to defraud or misrepresent." [R. T. 6337-6338. Emphasis added.]

In his opening brief, appellant has pointed out in detail that the court's instructions concerning complaint letters violated the rule of the *Phillips* case. Appellant will not repeat those arguments here because the government has ignored them in its brief. It is enough to recognize that the government cannot change its theory of admissibility after the jury has considered the evidence on the wrong theory. The letters were admitted to be considered on the question of the defendants' intent. The court instructed the jury to consider the letters on the question of intent. The jury did so. Theories can be changed by the government; but appellant's conviction based upon prejudicial error can be changed only by this Court.

(4) Appellant Repeatedly Objected to Complaint Letters Offered in Evidence.

In a final effort to avoid the application of the *Phillips* case, the government asserts that appellant did not object to the offer of complaint letters. This grueling thirteen week trial was fraught with objections to evidence ranging from the incompetent and prejudicial complaint letters to persistent acts of misconduct by the prosecutor. In such a trial defense counsel always experience the frustration of having to decide whether to object and take the chance of antagonizing the jury, or not to object and risk waiving the defect on appeal.

But appellant did object to the admission of complaint letters. Complaints are material against a defendant only if there is a *prima facie* showing "that such defendant had actual knowledge of the documents while the asserted scheme was in progress . . . Lacking such

prima facie showing, the documents should not be admitted." (*Phillips v. United States, supra,* 356 F. 2d at 306 and n. 8.) This Court reversed the convictions in *Phillips* because "[n]o such preliminary determination was made. . . ." (356 F. 2d at 306, n. 8.) Complaint letters may be considered on the question of criminal intent only if the evidence shows that a particular defendant had actual knowledge of the letters. But they are not even admissible until the government has made a *prima facie* showing of actual knowledge. Until then they are immaterial. Accordingly, counsel objected to complaint letters because "they are not material to the issues here" and because the statements in the letters constituted hearsay. [R. T. 4834.] The government made no attempt to show that appellant had actual knowledge of the letters. The court overruled appellant's objections when the prosecutor said the letters were "[t]o show that the information was so reported and that *Gamble had that information in their file.*" [R. T. 4834.] Counsel pointed out that the initial determination whether purchaser evidence should be submitted to the jury on the issue of intent was a question of law. [R. T. 2281-2282.] All such objections were overruled.

At no time did the prosecutor explain how complaints were material. His only justification for their admission was simply *that they were complaints.*

> "The Court: What is the materiality?
>
> Mr. Nissen: These are complaints and refunds [sic] files, sir, with letters from customers to and from, about their visits to the Ranch and so forth.
>
> The Court: Ordered in evidence." [R. T. 5958.]

When counsel objected to complaints because they were not material to the issues involved, the court said:

> "If there was testimony these were kept in the normal course of business I will allow them in." [R. T. 5958.]

It became obvious early in the trial that the court considered relevant and material all letters sent to the company and found in company files.

> "The Court: . . . If it is a letter in the file of Gamble Ranch and the file has been—the foundation has been laid, that the file is kept in the normal course of business, *I think it can be considered.*" [R. T. 4443. Emphasis added.]

The court had only to be satisfied that complaints were "kept in the normal course of business."

> "The Court: These are records of the Gamble Ranch?
>
> The Witness: Yes.
>
> The Court: Kept in the normal course of their business?
>
> The Witness: Yes.
>
> The Court: All right." [R. T. 6337. See also R. T. 8862-8865.]

Thus the court confused the business records exception to the hearsay rule with the question of materiality. The documents were not admissible as business records. (*Phillips v. United States, supra,* 356 F. 2d at 307.) And they were certainly not material merely because they were found in company files. The government made no showing of materiality. Defense objections were overruled without exception. In the face of the

court's rigid position the futility of continuing to object is obvious. The court recognized the ambivalent position in which defense counsel found themselves and accordingly permitted a continuing objection to all complaint and purchaser evidence.

> "Mr. Rothman: Before counsel starts, we had, as I understand, a continuing objection.
>
> The Court: Yes, as to these complaint files you have your continuing objection." [R. T. 6333. See also R. T. 2311-2313.]

The government's argument throughout this trial was that every paper found in company files or even remotely concerning the Gamble Ranch was admissible. The government made no attempt to demonstrate the materiality of the thousands of documents received in evidence. The defense protested that the prosecutor was making "'a blanket effort to lay a foundation by one general question as to every document". [R. T. 7513.] The protests were unavailing. The efforts were successful. The government made no showing that appellant had personal knowledge of complaint letters. It was not necessary to do so. The documents were admitted in evidence because they were in the possession of the company. The government's theory of evidence is unique: the government may offer any kind of evidence, no matter how prejudicial and incompetent it may be; no showing of materiality is necessary; the mere offer shifts the burden to the defendants to explain why the evidence is *not material.* Thus the government is relieved of all responsibility for the unfair presentation of evidence. It is always open to the government to complain on appeal that "the defense never once claimed a lack of personal knowledge of com-

plaints." (Govt's Br. p. 52.) But the defense did argue that the defendants had no personal knowledge of complaints. The court's answer was that the defendants' knowledge could be proved constructively, that the defendants were bound by the knowledge of anyone in the company.

> "Mr. Rothman: . . . Unless there is some evidence, it seems to me, that *that knowledge was conveyed to these defendants*—these defendants are not the defendants that hired him [attorney McDonald].
>
> *These defendants are individual defendants, they are not the corporation.*
>
> "The Court: Then the whole question is whether the attorney is an agent of the Company and when the Company employes [sic] him to answer complaints, it seems to me *they are bound by the notice he receives of the complaint.*" [R. T. 7515. Emphasis added.]

This Court expressly rejected such a constructive notice theory in the *Phillips* case. There the defendants arranged to have complaints processed by an escrow company of which Mrs. Bardwell was in charge. She handled complaints and reported weekly to the defendants. But her knowledge was not the knowledge of the defendants. They were not bound by the notice she received. The trial court's instructions were erroneous because:

> "Under the instruction given, the jury could have attributed knowledge to one or more of the appellants concerning the documents, because another appellant, or an acquitted defendant, *or the*

> *land company, escrow company, or the Bardwells* (who were not defendants) had actual knowledge of such documents." (356 F. 2d at 305. Emphasis added.)

Counsel for appellant did not mechanically repeat objections after the court had clearly indicated it would overrule them. The court had ruled. The rulings were erroneous. But these were errors that "would have been magnified in its influence on the jury by an objection and motion for mistrial." (*Dunn v. United States,* 307 F. 2d 883, 886 (5th Cir. 1962), citing *Ginsberg v. United States,* 257 F. 2d 950 (5th Cir. 1958).) Letters charging appellant with fraud and misrepresentation were seriously prejudicial to appellant's defense that he had at all times acted in good faith and had no intent to defraud. The courts recognize that in many cases "the failure to object to a grave violation manifestly stems from the attorney's fear that an objection would only focus attention on an aspect of the case unfairly prejudicial to his client." (*United States v. Sawyer,* 347 F. 2d 372, 374 (4th Cir. 1965).) At the end of the government's case in chief appellant moved to strike "all evidence pertaining to . . . letters of complaint, and files of Gamble Ranch relative to customer complaints, including but not limited to Exhibits 3-296 to 3-414, 3-415 to 3-550, 3-553 to 3-577, 3-2047, 3-2051, 3-2057, 3-2059a, 3-2060, 3-2062 and 3-2063." [C. T. 932.] The motion was denied.

The objections and motions to strike made by the defense throughout this case were sufficient to preserve appellant's right to question in this appeal the prejudicial errors committed by the trial court.

(5) The Erroneous Admission of Complaint Letters and the Court's Instructions Concerning the Purpose for Their Admission Constituted Plain Error.

Appellant did not frame his objections to complaint evidence in the precise terms of the *Phillips* case because that case was not decided until after appellant's trial. *Phillips* stated new principles. No case had so clearly defined the law concerning the admissibility of customer complaint letters. Appellant should not be penalized because counsel did not anticipate this supervening decision. And despite the government's argument, this Court has the inherent power to notice prejudicial error on appeal even in the complete absence of objections. This Court is not required to affirm a conviction rendered after an unfair trial. Criminal Rule 52b states the plain error rule:

> "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." (Fed. R. Crim. P. 52b)

Plain error is prejudical error. (*Kotteakos v. United States,* 328 U.S. 750, 765, 66 S. Ct. 1239, 90 L. ed. 1557, 1567 (1945); *Osborne v. United States,* 351 F. 2d 111 117 (8th Cir. 1965).) The erroneous admission in evidence of complaint letters in this case and the instructions concerning their admission constituted prejudicial error. This Court held in the *Phillips* case that such error was prejudicial. The Court there reversed the convictions even though there was "ample evidence to find appellants guilty beyond a reasonable doubt." (356 F. 2d at 306.) The prejudice is far greater in this case where not ten but hundreds of com-

plaint letters were erroneously received against appellant.

Error is likely to be prejudicial when the issue of innocence or guilt is a close question. This was a close case. Appellant's principal defense was his good faith. At the close of the prosecution's case, the court said that "the jury is going to have a very difficult time" deciding the question of good faith. [R. T. 9334-9335.] In *Osborne v. United States,* 351 F. 2d 111, 118 (8th Cir. 1965), the Court said:

> "The fact that the jury deliberated some sixteen hours, covering two full working days, that they requested an additional exhibit and the re-reading of instructions, lends credence to the view that the case was a close and difficult one."

In the present case the jury deliberated from June 29 to July 2, 1965. The record indicates that they deliberated for about thirty hours. The jury asked for an exhibit and made several other requests of the court during that time. On June 30, they asked the court to re-read the "*instructions on misrepresentation and intent.*" [C. T. 995-1004. Emphasis added.]

Where the evidence on both sides of a case presents a conflict that can only be resolved by a jury, it is necessary "that no prejudicial evidence be admitted in violation of any rule of law." (*United States v. Rohalla,* 369 F. 2d 220, 222 (7th Cir. 1966); see also *Gibson v. United States,* 363 F. 2d 146, 148 (5th Cir. 1966); *United States v. Readus,* 367 F. 2d 689, 692 (6th Cir. 1966).) In *Kotteakos v. United States,* 328 U.S. 750, 66 S. Ct. 1239, 90 L. ed. 1557 (1945), defendants were convicted of a single general conspiracy although the proof made out a case of several conspiracies. The

Court of Appeals held that the trial court's finding of only one conspiracy was erroneous but not prejudicial "since guilt was so manifest." (151 F. 2d at 172.) The Supreme Court reversed. The error was plain error. The test of plain error is not whether a conviction is supported by sufficient evidence apart from the error. The conviction must be reversed if there is a doubt whether the error substantially influenced the result.

> ". . . if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the jury was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry *cannot be merely whether there was enough to support the result*, apart from the phase affected by the error. *It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt,* the conviction cannot stand." (328 U.S. at 765, 90 L. ed. at 1566-1567. Emphasis added. Accord, *Oliver v. United States,* 335 F. 2d 724, 728 (D.C. Cir. 1964), cert. den. 379 U.S. 980, 65 S. Ct. 686, 13 L. ed. 2d 571; *Blackwell v. United States,* 244 F. 2d 423, 431 (8th Cir. 1957).)

This Court will consider an appeal the propriety of an instruction, even though no objection was made at the trial, where there is a "possibility that 'plain error' may be involved. . . ." (*Perkins v. United States,* 315 F. 2d 120, 124 (9th Cir. 1963).) The well established rule followed by the Ninth Circuit was announced in *Morris v. United States*, 156 F. 2d 525 (9th Cir. 1946):

> " 'Where life or liberty is involved, an appellate court may notice a serious error which is plainly

prejudicial even though it was not called to the attention of the trial court in any form.' In a criminal case, it is always a duty of the court to instruct on all essential questions of law, whether requested or not." (156 F. 2d at 527. Accord, *Remmer v. United States,* 205 F. 2d 277, 290, n. 16 (9th Cir. 1953); *Hatchett v. Government of Guam,* 212 F. 2d 767, 769 (9th Cir. 1954); *Block v. United States,* 221 F. 2d 786, 788 (9th Cir. 1955); *Samuel v. United States,* 169 F. 2d 787, 789 (9th Cir. 1948).)

The improperly received evidence and erroneous instructions in this case involved the critical issue of intent and good faith. Appellate courts are particularly inclined to find plain error in such a case. In *Danielson v. United States,* 321 F. 2d 441, 445 (9th Cir. 1963), the defendant was convicted of conspiring to forge United States Treasury Bonds. The trial court instructed the jury that the intent to defraud was an essential element of the offense but failed to add that the defendant's purpose must have been to obtain or to enable others to obtain a sum of money from the United States. Defendant's counsel did not object to the incomplete instruction as required by Criminal Rule 30. But because the instruction related to the vital issue of criminal intent the Court held the omission in the instruction was plain error.

As pointed out above and in appellant's opening brief, the trial court incorrectly held that complaint letters were admissible because the court supposed that the knowledge of one person in the venture could be imputed to appellant. The court's instructions permitted the jury to find appellant guilty on the basis of con-

structive knowledge. Such an instruction is plain error. In *Jefferson v. United States,* 340 F. 2d 193, 197 (9th Cir. 1965), the defendant was convicted of conspiring to deal with drugs knowing they had been illegally imported. The trial court instructed the jury that knowledge of one member of the conspiracy that the drugs had been illegally imported could be imputed to other defendants. Because the crime "requires proof of specific knowledge by the defendant that the drug was illegally imported," the court on appeal held that "the giving of such instruction constituted plain error, prejudicial to the rights of the appellant." (340 F. 2d at 197.)

In *Haner v. United States,* 315 F. 2d 792, 796 (5th Cir. 1963), the defendant was convicted of wilful failure to file income tax returns. The trial court erroneously instructed the jury that the word "wilful" meant a "careless disregard whether one has the right to so act." On appeal the Court held that the instruction constituted plain error and required reversal despite defendant's failure to object to it.

Many of the court's instructions in the present case told the jury that complaint letters *did come to the attention of the defendants.* The court took from the jury the question *whether they did* come to the defendants' attention. For example, when the court received in evidence exhibits 3-415 to 3-550 it told the jury:

> "The Government offers them as evidence of *the fact that these complaints came to the attention of the defendants.*" [R. T. 6333. Emphasis added.]
>
> * * * * *
>
> "Now these are offered, as I have already told you, I think no more than one occasion, not for

the truth of the facts set forth in the complaints but to show as evidence of *the fact that these came to the attention of the defendants. . . .*" [R. T. 6337-6338. Emphasis added.]

There are numerous other examples of instructions that took from the jury the question whether the defendants actually did have personal knowledge of the complaints. [See, *e.g.,* R. T. 6335, 5957-5959, 8867-8868.] These instructions constituted plain error. In *Clifton v. United States,* 341 F. 2d 649, 650-651 (5th Cir. 1965), the defendant was convicted of transporting a stolen vehicle in interstate commerce. The defendant denied having knowledge that the vehicle had been stolen. The court instructed the jury that there was "no dispute . . . as to the car being stolen." The defendant's counsel did not object to the instruction. The court on appeal held that because the instruction improperly assumed as true a fact in dispute it constituted plain error. (See also, *Barnes v. United States,* 341 F. 2d 189, 192 (5th Cir. 1965) [trial court's instructions improperly assuming that defendant had possession of car held plain error]; *Cross v. United States,* 347 F. 2d 327, 329-330 (8th Cir. 1965) [incorrect instruction on entrapment held plain error though defendant first objected and then withdrew objection]; *United States v. Harris,* 331 F. 2d 185, 188 (4th Cir. 1964) [instruction improperly permitting jury to consider evidence of defendant's reputation held plain error]; *Mims v. United States,* 375 F. 2d 135, 147-148 (5th Cir. 1967) [court's instruction that an attempt to rob a bank had been made because the defendant's actions had gone beyond the preparation stage held plain error].)

The issue of paramount importance in this case is whether the conviction is to stand even though it is based on prejudicial error. Even the government does not deny that the complaint letters were prejudicial to appellant. But the government asks this Court to hold that defense counsel waived appellant's right to a fair trial. The courts hold otherwise. In *Tatum v. United States,* 190 F. 2d 612 (D.C. Cir. 1951), the defendant was convicted of statutory rape. The jury had two functions, one to determine guilt or innocence, the other to pass upon the death sentence. Defendant's counsel in final argument admitted that his client was guilty. The admission was explained as a tactical maneuver to impress the jury with the candor of the defense in an attempt to persuade the jury to mitigate punishment. The court on appeal decided that the lawyer's admission "went too far" because the "client had not conceded guilt." (190 F. 2d at 618.) The defendant was deprived of a jury determination of his guilt or innocence because of his own lawyer's conduct. But in a criminal case, the court will "check carefully the record for error prejudicial to defendant *which he did not urge.*" (190 F. 2d at 614. Emphasis added. Accord, see *Williams v. United States,* 131 F. 2d 21, 22 (D.D.C. 1942); *Fisher v. United States,* 328 U.S. 463, 467-468, 66 S. Ct. 1318, 90 L. ed. 1382, 1386 (1945); *Screws v. United States,* 325 U.S. 91, 107, 65 S. Ct. 1031, 89 L. ed. 1495, 1505-6 (1945); *Morris v. United States,* 156 F. 2d 525, 527 (9th Cir. 1946); *Corson v. United States,* 147 F. 2d 437, 439 (9th Cir. 1945).) Technical mistakes will not be permitted to stand in the way of a fair trial. The Court in the *Tatum* case held that despite defense counsel's admission, the trial court should have

instructed the jury that they were to determine whether defendant was guilty.

> "Apparently relying upon defense counsel's view of the matter, the court did not specifically caution the jury that, notwithstanding the unauthorized concession, the defendant was entitled to have that body alone determine his guilt or innocence . . . This was a defect 'affecting substantial rights.'" (190 F. 2d at 618.)

In *United States v. Cumberland,* 200 F. 2d 609, 611 (3d Cir. 1952), the defendant was convicted for selling marijuana. The court gave erroneous instructions that assumed as true facts in dispute, and incorrectly stated the law regarding character evidence and the burden of proof. The Court reversed the conviction although no objections were made and even though the conviction was supported by the evidence. A lawyer cannot forfeit his client's right to a fair trial by failing to object to prejudicially incorrect instructions.

> "[W]here, particularly in a criminal case, several errors appear which in the aggregate contain a potential of substantial damage to the accused, *the policy of sound and time saving trial administration which would penalize failure to point out error below, may have to yield to more important considerations of making sure that the accused has been treated fairly.* We think this is such a case. The likelihood of injustice seems sufficient to require a new trial." (200 F. 2d at 611, Emphasis added.)

This was a close case. It is highly probable that the verdict was substantially influenced by the erroneous

admission of the complaint letters and by the court's incorrect instructions as to how the complaints were to be considered. The errors are prejudicial under the holding in the *Phillips* case. This Court has the power to cure the prejudice and resulting unfairness to appellant by reversing the conviction.

Conclusion.

(1) The trial court did not make the necessary preliminary determination that appellant had actual, personal knowledge of the hundreds of complaint letters admitted and considered against him. The court erroneously received the letters as business records. The government does not even contend that the court made the preliminary determination.

(2) The evidence is insufficient to show that appellant had actual, personal knowledge of the complaint letters. This Court decided in the *Phillips* case that general knowledge that complaints and refund requests were being made is not actual, personal knowledge. Appellant saw only thirteen complaint letters. This evidence is uncontradicted. At all times after January, 1962 independent counsel were retained to process complaints. There is no evidence that appellant saw any of these complaints. At trial the prosecutor argued that "*some* of the complaints" were "*perhaps*" referred to the defendants. [R. T. 2300-2301.] Emphasis added.] Now the prosecutor speculates that appellant had personal knowledge because he "kept in touch" with a Nevada attorney who handled complaints (Govt's Br. p. 53) or because letters "were available" to appellant. (Govt's Br. p. 54.) Such guesswork was rejected in the *Phillips* case. It should be rejected here.

(3) The trial court instructed the jury that complaint letters were to be considered on the question of intent. The court did not cite any other purposes for which complaints could be considered. The prosecutor offered the letters only on the question of intent. But now, because this Court in the *Phillips* case held that instructions like those given in this case constituted reversible error, the prosecutor proposes new theories of "admissibility." These theories are urged here for the first time. What might have been done is small comfort to appellant who was convicted because of what was in fact done. The government's untimely argument is pure sophistry and should be rejected.

(4) Appellant repeatedly objected to the introduction of complaint evidence. All objections were overruled. When the court made its position plain, appellant stopped objecting. Continued objections would not have changed the court's rulings. They would have magnified the prejudice to appellant.

(5) If the *Phillips* case had been decided when this case was tried, appellant's objections would have been more precise. Appellant should not be penalized because counsel did not couch his objections in language as specific as that used by this Court in applying the principles so clearly enunciated in *Phillips*. The errors concerning complaint evidence constitute plain and prejudicial error under Rule 52(b). This Court has the power to redress the errors committed by the trial court by reversing the conviction.

II.

SUPPRESSION OF EVIDENCE.

A. Answers to Government Questionaires.

In the Appellant's Opening Brief it is argued that there was a suppression of evidence in the refusal of the government to disclose to the defense answers to questionaires which the government had sent out to all of the Gamble Ranch purchasers and prospective purchasers. In reply to this argument, the government does not deny that they had and have such documents; it is not denied that disclosure was demanded and refused; and the government does not contend that the undisclosed answers to questionaires would not have been helpful. Instead the following arguments are made: (1) that the Jencks Act (18 USCA 3500) justifies nondisclosure (Govt's Br. pp. 58-59); (2) that the names and addresses of the Gamble Ranch purchasers and prospective purchasers were available to the defendants (Govt's Br. p. 59); and (3) that the government's proof showed that there were misrepresentations made even to some "satisfied buyers", and the fact that there were other "satisfied buyers" would not "exculpate" the defendants. (Govt's Br. p. 60.)

(1) The Jencks Act.

In our opening brief we have already argued that the Jencks Act is not applicable by its terms because: (1) it applies only to government witnesses or prospective government witnesses, and the persons who answered government questionaires and were not called by the government are neither; and (2) it cannot be constitutionally applied to a suppression of evidence case. (App. Op. Br. pp. 76-78.) We will not repeat that argument

here. There are two additional reasons, however, for not applying the Jencks Act to this type of situation.

First: If the Jencks Act were construed as applying to witness statements in the possession of the government, although the government never calls the witness, then it cannot be reconciled with the holdings of the cases. Herein we will consider only cases decided since enactment of the Jencks Act in 1957.

In *Barbee v. Warden* (4th Cir. 1964), 331 F. 2d 842, failure to disclose fingerprint and ballistics reports was held to constitute a denial of due process. This is essentially the same as a witness statement. Such reports are customarily proved by the testimony of the expert who prepared the report, not by the report itself. In *Ashley v. Texas* (5th Cir. 1963), 319 F. 2d 80, the prosecutor failed to disclose a psychiatric report. In *Ellis v. U.S.* (D.C. Cir. 1965), 345 F. 2d 961, the case was remanded for the purpose of inquiring into the reason for discharging the victim from a hospital the same night he was admitted. This was also in the nature of a witness statement. The inquiry would begin by an examination of the hospital records, but if any evidence was thereby disclosed it would be presented by testimony of the attending physician. In *Giles v. Maryland* (1967), 386 U.S. 66 [17 L. Ed. 2d 737, 87 S. Ct. 793], there were separate opinions. One opinion by Justice White states that the defense should have been told that the prosecutrix had undergone a psychiatric examination, in which event the defense might have called the doctor who made the examination. *Brady v. Maryland* (1963), 373 U.S. 83 [10 L. ed. 2d 215, 83 S. Ct. 1194], is more directly in point than any other post-Jencks

Act case. The thing suppressed there was an extra-judicial confession of the co-defendant Boblitt who was not a prosecution witness.

There can be no question but that the Jencks Act, if given the broad interpretation contended by the government, cannot be reconciled with these cases. It might be argued that these cases do not create any inconsistency because they all arose out of state court convictions, and the Jencks Act applies only in the federal courts. This is true of all but one case. *Ellis v. U.S.* (D.C. Cir. 1965), 345 F. 2d 961, was an appeal from the United States District Court for the District of Columbia. This is not a valid distinction. The suppression of evidence cases are founded on due process. The United States Constitution guarantees due process in all courts, state and federal. It would be a strange rule indeed if it were held that the identical thing which constitutes a denial of due process in a state court does not have the same effect in a federal court because Congress has enacted a statute permitting federal prosecutors to do that which state prosecutors cannot.

Second: The Jencks Act can be reconciled with the due process cases by construing it so as to avoid the constitutional problem. In our opening brief we have argued that the Jencks Act is not applicable by its terms because it applies only to government witnesses and prospective government witnesses, and all of the answers to questionaires involved here were given by people who were never called as government witnesses. It is arguable, however, that up to and during the time that the government is presenting its case in chief, every witness is in a sense a "prospective witness". But

when the government rests its case, that is no longer true. At that point any witness the government has not called is no longer a "prospective government witness". In other words, the Jencks Act can be reconciled with *Brady v. Maryland, supra,* by holding that the Jencks Act ceases to apply when the government rests its case, and the prosecutor's duty to disclose the evidence he has not used then begins.

This construction is consistent with the purpose of the Jencks Act which was passed to restrict the holding of the *Jencks* case. (*Jencks v. U.S.* (1957), 353 U.S. 657 [1 L. ed. 2d 1103, 77 S. Ct. 1007].) One reason for the restrictive legislation has been stated to be that the *Jencks* case "posed a serious problem of national security" (*Palermo v. U.S.* (1959), 360 U.S. 343, 346 [3 L. ed. 2d 1287, 79 S. Ct. 1217].) That reason is applicable to relatively few criminal cases, and it clearly has no relevance to this case. The real, though perhaps unwritten, reason for the Jencks Act is the same argument made in opposition to all proposals to expand criminal pretrial discovery. The government is concerned that defense counsel will tamper with government witnesses. That reason also ceases to exist when the government rests it case and thus decides not to call the witness. At that point at least there is no justification for depriving the defendant of the opportunity to use the evidence when he presents his case. The Jencks Act was never intended, and cannot be constitutionally construed, to authorize the government to suppress evidence.

(2) The Availability to the Defense of the Lists of Names and Addresses of Purchasers and Prospective Purchasers.

The government also claims that the answers to questionaires cannot be deemed suppressed because the names and addresses of all purchasers were available to the defense. There are several answers to this argument.

In the first place, it is not knowledge of the fact that a given person is or may be a potential witness that is the controlling thing. The important thing is the knowledge of what the witness would say. If the prosecutor has such information and the defense does not, the prosecutor has a duty to disclose it. It is not a sufficient answer to say that the defendant knew the witness existed and could therefore have interviewed him and have found out for himself what the witness would say. *United States ex rel. Thompson v. Dye* (3rd Cir. 1955), 221 F. 2d 763, 767-768, is cited by the government for this point, but it is authority for our position. (Govt's Br. p. 59.) Therein the court recognized the general rule that "Evidence is not suppressed or withheld if the accused has knowledge of the facts and circumstances or if they otherwise become available to him during the trial". But the court held that the rule was not applicable when the defendant knew only that the witness existed and had not been apprised of what he would say. One of the arresting officers was not called by the prosecution, but his identity was known to the defense, and he was even present in the courtroom. The prosecutor knew and the defendant did not know that the officer's testimony would have favored the defense. The prosecutor's failure to disclose this information was held to be a denial of due process.

In fact, many of the suppression of evidence cases involve situations where everyone knows the witness exists, but where the prosecutor has special knowledge of what the witness would testify to if asked. In *Giles v. Maryland* (1967), 386 U.S. 66 [17 L. ed. 2d 737, 87 S. Ct. 793], much of the information in question could have been obtained by talking to the police officers, the prosecutrix, or other prosecution witnesses. In *United States ex rel. Butler v. Maroney* (3rd Cir. 1963), 319 F. 2d 622, the evidence in question was a prior inconsistent statement of a prosecution witness. Surely the witness knew he had made such a statement, and could have told the defense if asked. In *Ellis v. U.S.* (D.C. Cir. 1965), 345 F. 2d 961, the case was remanded to inquire into hospital records. It was the defendant's own testimony that one of the arresting officers had told him about the victim's going to the hospital, that raised the question. Clearly the records were as available to the defense as they were to the prosecution.

In the second place, the witnesses were not in fact as available to the defense as they were to the prosecution. The government's investigation had the effect of making these people unavailable to the defendant. The government questionaires were sent out over a year prior to the trial with a covering letter from the United States Attorney. The letter informed the people that an official investigation was in progress, and they were told that *"Since this is an investigation, it is requested that you treat this communication as confidential."* [Deft. Ex. BV; App. Op. Br. Appendix E.] Many people would take this to mean that they should communicate on this matter only with the United States Attorney's office. Far less

has been held to constitute a suppression of evidence. In *Alcorta v. Texas* (1957), 355 U.S. 28 [2 L. ed. 2d 9, 78 S. Ct. 103], the prosecutor told a witness not to "volunteer" certain information. He did not even tell him to go so far as to keep it in confidence. This was held to constitute a denial of due process.

(3) Proof of Misrepresentations to "Satisfied Buyers"; and Satisfied Buyers Would Not "Exculpate" the Defendants.

If the government contends that all satisfied buyers thought the land had been misrepresented to them, it is mistaken. As one example, Mrs. Garrick testified and so stated in answer to the government questionaire which she and her husband filled out, that she had seen the land she purchased, and she felt that it had been "accurately represented". [Govt's Ex. 1-1125; App. Op. Br. Appendix E.]

The fact that other defense witnesses by way of satisfied purchasers would not "exculpate" the defendants because there is no requirement that every purchaser or any purchaser be deceived is entirely beside the point. The defendants are not here contending that the evidence is insufficient to support the verdict. The question is whether the defendants were deprived of the opportunity to use evidence which might have helped them. If the government is contending that the testimony of purchaser witnesses has little probative value, we are included to agree. But it was the government, not the defendants, that introduced this issue. The defendants would much prefer to try, for example, the water issue on scientific evidence instead of on the lay opinions of purchasers as to the availability of water. The legal

probative value of the opinions of the purchasers is doubtful in the extreme, but at the same time this type of testimony was very damaging to the defendants in the eyes and ears of the jury. Once the government put in this type of evidence, it became an important issue. Every satisfied purchaser the defense could find was an important witness. The defendants were deprived of the opportunity to fully meet this issue by the withholding of the answers to government questionaires.

B. Division of Real Estate Files.

As we read the government's argument on the Division of Real Estate files, it makes these points: (1) these files were not producible under the Jencks Act or the subpoena; and (2) the files could not be used to impeach Division of Real Estate witnesses on collateral matters. (Govt's Br. pp. 60-64.)

(1) Jencks Act and Subpoena.

The Jencks Act has no application whatever to the Division of Real Estate files. All of the arguments heretofore made with respect to the Jencks Act, vis á vis the answers to government questionnaires, are applicable here. The Jencks Act is not applicable to the Division of Real Estate files for the additional reason that they are state files. The Jencks Act deals only with statements made to agents of the United States government. (18 USCA 3500, subd. (a).) We do not understand the government to contend that there are such statements in the California Division of Real Estate files. Any such statements would be in the files of the United States government.

The subpoena has no bearing upon the suppression of evidence problem except in so far as it shows that the defense made a demand for disclosure of the files. The reality of the situation was that the Division of Real Estate, to whom the subpoena was directed, did not have the files at all. They had been delivered to and used by the United States Postal Inspector in preparation of the government's case. The significance of the facts relating to the subpoena is to show that when it became apparent that the prosecutor had the files, the defense demanded them and the prosecutor refused to disclose them.

There is no requirement that a proper subpoena or that any subpoena be served to require the prosecutor to divulge evidence favorable to the accused. None of the suppression of evidence cases involves a subpoena. At most there is only some type of general request or demand. In *Brady v. Maryland* (1963), 373 U.S. 83, 84 [10 L. ed. 2d 215, 83 S. Ct 1194], the defendant requested to see all of Boblitt's extrajudicial statements made prior to trial. This general demand was held sufficient. In *United States v. Rutkin* (3rd Cir. 1954), 212 F. 2d 641, 644-645, the court said: "Appellant does not allege the contents of the statement with greater particularity, he says, because he has not been able to obtain access to it. In fact, such access is one of the things he is requesting in this court." If the defendant does not know that the evidence exists, there is no requireent to make any demand until he discovers that there was a suppression of evidence. In *United States ex rel. Meers v. Wilkins* (2nd Cir. 1964), 326 F. 2d 135, the defendant had been tried and con-

victed in 1937. In 1961 he discovered that the prosecutor had failed to disclose two witnesses that would have been favorable to him. Habeas corpus was granted. In fact, one case, *Ellis v. U.S.* (D.C. Cir. 1965), 345 F. 2d 961, indicates that even a request for disclosure is not required. In that case it does not appear that any demand for the evidence was made during trial. But the Court of Appeals remanded to inquire into hospital records because the defendant had testified that one of the arresting officers had told him that the victim had been taken to a hospital.

In the case now under consideration, the subpoena is immaterial. It cannot be disputed that the defendants asked to see the Division of Real Estate files, and it cannot be denied that their request was refused. Those files were sealed and have never been disclosed.

(2) Impeachment on Collateral Matters.

In our opening brief we have shown that there was a sharp conflict on important issues between the testimony of Reisman and Block, who was the head of the Division of Real Estate. Reisman claimed that he acted in good faith because he cooperated with the Division of Real Estate in submitting the necessary information for public reports, and that it would not make sense for the Division of Real Estate to issue the reports if they had any evidence of fraud. Block said no one is justified in relying on a public report. It issues as a matter of course based on whatever information is submitted. And Block said that although he was the head of both the Public Report and Investigative Departments, there was still no correlation between the two. The Public Report Section would not even

know that the Investigative Section was making a fraud investigation unless some formal action was taken. The testimony was also in conflict on the question of approval of advertising. Block said they did not approve. Reisman said they did. (App. Op. Br. pp. 62-69.)

The government concedes that there were such conflicts in the evidence. And they do not seriously dispute the probability that the Division of Real Estate files would be useful in resolving these issues. Instead, they say, in effect, that if there is any such evidence it would be immaterial. The government says that Block's direct examination was carefully limited to: "(1) Commission procedures in issuing a public report and Block's contacts with Gamble Ranch in this regard (7039-7060) and (2) that the Commission did not approve Gamble Ranch advertising and was not shown most of it (7061-7065)." (Govt's Br. pp. 60-61.) Then, after saying that this had been Block's direct examintion, (and indeed it was), the government contradicts itself. It says that Block's contrary testimony on the question of approval of Gamble Ranch advertising was brought out on cross-examination, and therefore the Division of Real Estate files cannot be used to impeach him on this point because it was a collateral matter. (Govt's Br. p. 63.)

The case cited for this proposition, *McKune v. U.S.* (9th Cir. 1924), 296 Fed. 480, is not in point. The charge in that case was selling narcotics. On cross-examination the defense asked a prosecution witness if she had ever been a prostitute, and she denied it. The defense then sought to prove that she had been a prostitute. The court held that this was a collateral issue

and excluded the evidence. The correctness of this ruling is no longer free from doubt. In *Giles v. Maryland* (1967), 386 U.S. 66 [17 L. ed 2d 737, 87 S. Ct. 793], Justice Fortas said there was a supression of evidence in failing to disclose subsequent specific acts of misconduct on the part of the prosecutrix because the evidence would have been material to the issue of credibility.

In any event, there can be no doubt that the issue of Division of Real Estate approval of advertising was material in this case. It was not collateral under any definition of the word. Whether the defendants acted in good faith without intent to defraud was an important issue. Whether their advertising had been approved by the Division of Real Estate of the State of California was material to that issue.

Furthermore, our claim that the Division of Real Estate files would have been useful to the defense is not limited to its probable value in cross-examining the Division of Real Estate employees. Block admitted that public reports were issued after the fraud investigation was in progress for some time. He sought to destroy the inference from this that their investigation showed no fraud by saying one department does not know what the other is doing, and he thereby sought to draw the contrary inference that their investigation did show fraud. We are not satisfied with this. We contend that the Division of Real Estate investigation would show no fraud and that the files would contain evidence to support that conclusion. We do not believe Block when he says that each of his two departments is unaware of what the other is doing. What harm could

there possibly be in making that evidence available to the defendants? There is no justification for turning these state files over to the United States government, permitting the government to use them in preparation of its case, and then denying the defense the right to also use the files.

III.

THE PROSECUTOR'S MISCONDUCT.

Appellee asserts that appellant's protests about the prosecutor's misconduct were unfounded, not in good faith, an attempt to cover up guilt by attacking the prosecutor, and exaggerated in number. (Govt's Br. pp. 65-66, 80, 90.) Appellee charges defense counsel with bad faith in raising the possibility of misconduct with reference to the witness Beatie. (Govt's Br. pp. 65, 66.) An examination of the full record on this point discloses no bad faith, only an attempt by defense counsel to protect the defendants from serious prejudice by bringing before the court a possible instance of prosecution intimidation of the witness Beatie. This was done without the jury being present. [R. T. 1542-1548.]*

The problem raised by defense counsel was that they had been informed the prosecutor told Beatie that if he did not testify as he did before the grand jury the Government would ". . . take steps to take care of the situation." (See Appendix, colloquy). This whole

*The pertinent colloquy on this point is reproduced in Appendix A, No. 1.

situation is a graphic illustration of how the secret grand jury proceeding is a deprivation of a fair trial under the Due Process Clause. (See Point V, App. Op. Br.) Beatie was a witness at the grand jury. [R. T. 1547-1548.] There the prosecutor could, in effect, take his "deposition" without defense counsel present. As a participant in the Gamble Ranch venture, Beatie was under duress as a potential defendant. There was every motivation for him to testify so as to please the prosecutor to avoid being formally charged himself. With no defense counsel present to cross-examine Beatie he was necessarily committed to testimony favorable to the government. And, when cross-examination at trial brought out matters perhaps unpleasing to the prosecutor, Mr. Beatie could be subjected to the intimidating threat of a possible perjury prosecution. Defense counsel were absolutely correct in insisting that the matter be inquired into fully by the court without the jury present. Fundamental fairness demanded that because neither side could be damaged. But possible further prejudice to the defendants was a clear possibility in going into the matter "blind" by cross-examination before the jury. The prosecutor, having failed to deny the charge of intimidation at the time it was raised cannot, on appeal, charge defense counsel with bad faith and abuse merely because they sought to protect their clients by demanding the court look into the matter first before it went to the jury.

The Prosecutor Asked Beatie Questions Insinuating and Suggesting the Existence of Facts in Respect to Which No Proof Was Ever Offered.

Beatie did advertising for Gamble Ranch from about July, 1960 to the latter part of 1961. [R. T. 1465-1468, 1583-1584.] Three times the prosecutor insinuated by his questioning that *during this time* Gamble Ranch was under investigation by the California Real Estate Commission and the Better Business Bureau. [R. T. 1662-1663, 1665.] This questioning was with reference to Government Exhibit 2-1017, a memorandum of January 23, 1961 from defendant Joe Benaron to defendant Samuel Reisman with carbon copy to Mr. Beatie.*

The whole intent and purpose of these questions to Beatie by the prosecutor was to insinuate to the jury that in January, 1961 there were investigations of the Gamble Ranch by the Real Estate Commission, that defendants knew of these investigations, and were trying to cover them up. [See R. T. 1674-1681 and 1741-1747.] The Court informed the prosecutor that he would have to present evidence to support the insinuations.**

The next day the prosecution presented some documentary evidence which wholly failed to provide any

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*The pertinent Examination of Beatie and Colloquy of court and counsel on this point is reproduced in Appendix A. No. 2.

**The pertinent colloquy is quoted in Appendix A, No. 3.

support for his insinuating questions. [R. T. 1839-1845.] The court expressed its intention to grant defense counsel's motion to instruct the jury so as to cure the harm done by the prosecutor's insinuating questions. [R. T. 1839-1845.] Still, the prosecutor fought vigorously to preclude court instruction, and then, when the court insisted, attempted, successfully, to get the court to water down the instruction. The innocuous instruction was finally given a day after the damaging, suggestive, and erroneous questions were put. [R. T. 1845.]

The prosecutor's tactic was to suggest by questions the existence of facts he could not prove by testimony. This is prejudicial misconduct. See *Berger v. United States,* 295 U.S. 78, 79 L. ed. 1314, 1319 (1935); *People v. Hamilton,* 60 Cal. 2d 105, 116 (1963).

A. The Consent Agreement.

The prosecutor argues, on appeal, that when the Consent Agreement [Ex. 1-1125] ". . . was offered and received, the defense made no objection . . ."; that, therefore, the defense ". . . should not be allowed to raise for the first time on this appeal a matter which he did not object to and thus did not give the trial court an opportunity to rule on." (Appellee's Br. p. 69.)

Under the circumstances here, this is a specious argument. The primary defense in this case was the "good faith" of defendant Reisman, his lack of knowledge of

any misrepresentations by salesmen, and his efforts to eliminate any misrepresentations which were brought to his attention. The record shows that the California Real Estate Commission filed an Accusation charging the Pacific Westates Corporation with misrepresentations in sales of parcels of the Gamble Ranch to California residents. [R. T. 6267-6283.] The *Accusation,* a formal document, was proposed as Government Exhibit 1-1124. In a letter to purchasers, Bertram H. Ross wrote ". . . the company . . . has not at any time been charged with fraud or misrepresentations." (Appellee's Br. pp. 70-71.) The indictment charged this statement was one of several made to "lull" purchasers by explaining away unfavorable publicity (Appellee's Br. p. 71.) Accordingly, the defense stipulated that the Accusation [Ex. 1-1124] had been made, and agreed that the accusatory language could be read to the jury. On this basis the prosecutor accepted the stipulation, read portions of the Accusation into the record, and agreed to, and did, withdraw his offer to introduce Exhibit 1-1124 into evidence. *It was also stipulated that none of the defendants were named personally in the Accusation.* [R. T. 6267-6283.]

The Consent Agreement and Stop Order [Ex. 1-1125] presented an entirely different situation. The defendants personally signed the Consent Agreement, and the Stop Order referred to the Agreement and named the defendants. However, Ross was correct when he stated, in a letter to purchasers, and in his testimony in court, that the Order does not specifically

charge fraud or wrongdoing. (See App. Op. Br., pp. 81-83, 90.) Only Business and Professions Code Section 11018(b) provides for refusal to issue a public report when:

> "(b) The sale or lease would constitute misrepresentation to or deceit or fraud of the purchasers or lessees."

The Consent Agreement does *not* specify section 11018(b) as the jurisdictional basis of the Stop Order. It is clear that under the applicable provisions of the Calfornia Business and Professions Code that after conducting a hearing pursuant to Business and Professions Code section 10086 the Real Estate Commissioner, upon a sufficient showing, may issue a Stop Order to prohibit sales of subdivision land without showing any fraud. See *Chapman v. Division of Real Estate,* 153 Cal. App. 2d 421, 430 (1957) (and App. Op. Br., p. 90).

Furthermore, Exhibit 1-1125 was only signed pursuant to a good faith agreement between the named signatories and the Real Estate Commissioner that signing the agreement would not constitute an admission of fraud. (See App. Op. Br. pp. 81-83.)

Secure in the knowledge of these facts the defense had *no reason* to object to the introduction of the Consent Agreement—other than its immateriality. In offering Exhibit 1-1125 the prosecutor did not even specify *any purpose* for its reception in evidence.

Accordingly, not realizing that the prosecutor was going to use it as an admission of fraud, the defense did not object. The document was offered and received into evidence early on the morning of May 12, 1965. It reposed among the other exhibits until late in the afternoon of May 12th, when the prosecutor used it during the examination of witness Carey. [R. T. 6454, see App. Op. Br. pp. 91-92.] The improper use the prosecutor made of this evidence, and the reasons for its impropriety are set forth fully in Appellant's Opening Brief at pages 81-93.

It is also clear why the defense did not object before the jury after having been seriously prejudiced. Precisely the same thing happened in *Dunn v. United States,* 307 F. 2d 883 (5th Cir. 1962). There, the prosecutor's misconduct consisted of (1) arguing unfairly that equivocal evidence constituted an admission of guilt; and (2) arguing his personal belief in the defendant's guilt. In *Dunn* the court noted that *the prejudice from such tactics is "'. . . magnified in its influence on the jury by an objection and motion for mistrial.'"* 307 F. 2d at 886. (Emphasis added.) That is precisely the situation here. Defense counsel feared that to object would be to magnify the prejudice. But they did *not* waive the error merely because they decided to present explanatory and defensive testimony to rebut the prosecutor's argument after having decided not to object. It is recognized by the courts that prosecutorial misconduct presents a dilemma to the de-

fense attorney. If he objects he aggravates the matter by emphasizing it to the jury and may appear to be attempting to conceal relevant but harmful evidence; if he decides *not* to object he is apt to be charged with waiver of the error. Accordingly, the courts do not require a particularized objection where defense counsel may have feared to object because ". . . an objection would only focus attention on an aspect of the case unfairly prejudicial to his client." *United States v. Sawyer,* 347 F. 2d 372, 374 (4th Cir. 1965); *Dunn v. U.S.,* 307 F. 2d 883, 886 (5th Cir. 1962); *Ginsberg v. U.S.,* 257 F. 2d 950, 955 (5th Cir. 1958). Furthermore, under Rule 52(b), Federal Rules of Criminal Procedure:

> "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

The prosecutor's use of the Consent Agreement was plain and prejudicial error under Rule 52(b).

The prosecutor argues that if there was error it was not due to any misconduct on his part. (Govt's Br. p. 68. We disagree. The prosecutor's only excuse for his misconduct in this regard is that it did not necessarily harm defendants because the jury could disregard the government attorney and believe the defense witnesses! (Govt's Br. p. 71.) In his desire for a conviction here the prosecutor has so blinded himself to the proprieties that he has had the temerity to suggest at pages 69 and 70 of his Brief that the Consent Agreement was not even offered as an admission

of fraud, while at pages 71 and 72 he quotes portions of the record where he clearly argued just the contrary to the jury.

B. The Circumstances Did Not Excuse the Prosecutor's Devious Attempt to Prejudice Appellant by Wrongfully Exposing a Co-Defendant's Conviction.

The cases cited by the prosecutor at page 77 of Appellee's Brief do not justify what was done here in the name of impeaching the witness Clejan. (See App. Op. Br. pp. 95-102, and Appellee's Br. pp. 73-79.) In *United States v. Murray,* 297 F. 2d 812 (2nd Cir. 1962) and *Meeks v. United States,* 179 F. 2d 319 (9th Cir. 1950), the witness was impeached by a showing of a felony conviction in *another case.* Here the conviction shown arose out of the same indictment under which appellant was being prosecuted. In *United States v. Jannsen,* 339 F. 2d 919 (7th Cir. 1964) and *United States v. Vasquez,* 319 F. 2d 381, 386 (3rd Cir. 1963) it was not brought home to the jury, as here, that the witness' conviction was a result of the same charge for which the defendants were being prosecuted. *Davenport v. U.S.,* 260 F. 2d 591 (9th Cir. 1958) is distinguishable because there it was defendants who were the cause of the jury learning of the pre-trial guilty plea of a co-defendant named Errion; defense strategy was to place all the blame on Errion; accordingly, the jury was not prejudiced towards defendants by finding out about Errion's plea of guilty. In *Wood v. United States,* 279 F. 2d 359 (8th Cir. 1959) the co-defendants decided to plead guilty *during* trial so that it was clearly incumbent on the court to inform the jury of the plea to explain their disap-

pearance from the case. In *Wood* the court gave a proper cautionary instruction to the effect that the co-defendant's guilty plea raised no inference as to guilt of the remaining defendants.

In *United States v. Freeman,* 302 F. 2d 347 (2nd Cir. 1962) the court noted that generally the prosecutor vouches for his own witness and thus may be obliged to reveal matters affecting their credibility, such as felony convictions. In *Freeman* the court noted the exceptions to this rule, saying:

> "There may be circumstances where, on proper request of the defense, the trial judge should limit, or even bar such testimony or allow it only under cautionary instructions because the prejudice to the defendant of the witness' admission of crime implicating the defendant would outweigh the advantages of a full disclosure of the witness' criminal background."

Freeman found no likelihood of prejudice in that case because

> "It must have been crystal clear to the jury that [the witness in question] had [previously] pleaded guilty to the [same] offense [in the state court]."

But *Wood* and *Aronson* cited by Appellee apparently ignored the command of the United States Supreme Court in *Grunewald v. United States,* 353 U.S. 391, 420, 1 L. Ed. 2d 931, 952 (1957). *Grunewald* clearly disapproves the practice of disclosing a co-defendant's admission of guilt. (See App. Op. Br. pp. 98-100.)

Here, the circumstances do not allow any other conclusion than that the prosecutor was guilty of misconduct. He asked the court's permission to impeach

Clejan only for surprise and damage due to allegedly unexpected testimony inconsistent with what he had anticipated. But the prosecutor went further; he impeached beyond the point of surprise; he exceeded the license given him by the court, and did so in a devious manner without warning.

C. The Prosecutor Insinuated Without Basis That the Witness Roche Had Been Subjected to Criminal Prosecution for Fraudulent Advertising.

At trial the prosecutor attempted to justify his insinuation that Roche had been guilty of mail fraud in other cases. The prosecutor asserted that the basis for his prejudicial question was a case in this circuit in which Roche

> ". . . had advertising which [was] the subject of prosecution for misrepresentation." [R. T. 14246-14247; see App. Op. Br. p. 104.]

Appellant's Opening Brief identified the case referred to by the prosecutor—*Harris v. United States,* 261 F. 2d 792 (9th Cir. 1958)—a mail fraud prosecution where defendants had employed Roche as an advertising man for their desert real estate subdivision. Roche's "involvement" was only as a witness—not as a defendant. Roche was not even indicted in *Harris.* Appellee does not deny that the prosecutor was referring to the *Harris* case. The attempt to discredit Roche is thus exposed as the work of a prosecuting attorney who knew full well that there was no legal basis whatsoever for his question, which had no probative value whatsoever, *unless to insinuate that Roche* was at least a party to fraudulent advertising in a prior mail fraud case. The tactic necessarily prejudiced Appellant by implanting

in the minds of the jurors the idea that Appellant here had selected Roche for his supposed talent for fraudulent advertising. The prosecutor's admission makes it clear that the attack on Roche was not inadvertent, but a calculated attempt to influence the jury by an insinuating and improper question, *i.e.,* the false suggestion that Roche had been prosecuted for mail fraud.

D. Appellee's Brief Does Not Demonstrate Any Good Cause for the Prosecutor's Personal Attack on Defendant Reisman's Integrity and Credibility.

The prosecutor implied that Reisman could not truthfully testifiy under oath that he had not tampered with a government file, and stated for the benefit of the jury that Reisman's testimony on another point could not be impeached only because of the death of the only party able to contradict him. (App. Op. Br. pp. 109-113.) The prosecutor counter-attacks by asserting that "several false statements [were] made by Reisman" (Appellee's Br. p. 80), but fails to cite any place in the record to support the contention Riesman testified falsely. The prosecutor also denies he accused Reisman by specific use of the word "perjury". (Appellee's Br. p. 80.) However, in view of what he did say and imply it was obviously unnecessary for him to use such words to communicate to the jury his impression that Reisman's credibility and integrity were suspect for reasons the prosecutor broadly hinted at. The vice of the prosecutor's tactic is clear; being unable to present competent evidence to impeach Reisman he resorted to innuendo. That is misconduct. *Berger v. United States,* 295 U.S. 78, 79 L. ed. 1314, 1319 (1935).

E. The Prosecution Cast Aspersions on Defense Counsel's Integrity.

At page 81 of Appellee's Opening Brief the caption denies any accusation was made that defense counsel tampered with the evidence. But at pages 83-84 of the same Brief the prosecutor makes it clear he didn't mean what he said in the caption and reiterates the insinuation that defense counsel's handling of the documents was either highly improper or outright tampering. Such attacks on the integrity of opposing counsel are disapproved as misconduct amounting to reversible error where, as here, there is no basis for the aspersions. *Berger v. United States,* 295 U.S. 78, 88, 79 L. ed. 1314, 1321, 55 S. Ct. 629 (1935); *New York Central R. Co. v. Johnson,* 279 U.S. 310, 316-318, 73 L. ed. 706, 710, 49 S. Ct. 300 (1929).

F. The Prosecutor Admits He Read to the Jury Prejudicial, Inadmissible and Inflammatory Matters From Complaint Letters.

The letters read into the record by the prosecutor and reproduced at pages 86-88 of Appellee's Brief contain matters which were clearly and exactly what Appellant described them to be—inadmissible and inflammatory material quite likely to arouse the sympathy of the jury for the "victims". The prosecutor does not deny the prejudicial character of these letters; he states that

> ". . . when he realized what he was reading he stopped." (Appellee's Br. p. 88.)

The record reveals this material was not read by inadvertence; the prosecutor said in open court that he had carefully selected only the material that was pertinent because he was compelled by the court to limit his

reading to the jury, to be selective; that he would employ only ". . . selected files of complaint letters . . ." from which he ". . . had made up a list of the ones [he] wanted to read from." [R. T. 6333-6338, 6370-6371, and especially 6333 and 6338; App. Op. Br.] This is prejudicial misconduct. *Beck v. United States,* 33 F. 2d 107, 113 (8th Cir. 1929); *United States v. Grayson,* 116 F. 2d 863 (2nd Cir. 1948).

G. The Prosecutor Used Incompetent Matter to Assert That All Out-of-State Land Subdivisions Are Fraudulent.

Appellant's Opening Brief points out the following improper misconduct by the prosecutor; assertions that a well-informed buyer would not pay the asking price for Gamble Ranch parcels; that other subdivisions selling for comparable prices resulted in mail fraud prosecutions; that the California Real Estate Commissioner referred to most out-of-state land developments as "fraudulent schemes"; that such reference necessarily included Gamble Ranch; that defendants were "con men" who were "fleecing the public." (App. Op. Br. pp. 123-134.) The prosecutor does not deny that it was his intention to leave the impression that such hearsay charges against other parties not before the court were also applicable to defendant. The prosecutor admits that

> *"The obvious purpose of the prosecutor's question[s] was to test the credibility of Reisman's 'good faith' defense by inquiring if upon reading the article he did not realize that he might be engaged in a promotion which was deceiving purchasers."* (Appellee's Br. p. 90.)

The prosecution's bald-faced assertion that the misconduct cases cited in Appellant's Opening Brief are not relevant is the only way he could attempt to explain away his inexcusable and prejudicial misconduct. There is not the slightest attempt to distinguish *any* of these cases. This court should hold that the prosecutor's misconduct, in and of itself, requires reversal.

IV.

THERE IS NO EVIDENCE IN THE RECORD TO SHOW ANY PARTICIPATION IN THE GAMBLE RANCH ENTERPRISE BY APPELLANT REISMAN BEFORE MAY 24, 1960 AND AFTER JUNE 15, 1962.

Appellee states that "the date [appellant Reisman] became a shareholder does not reflect the date he joined in the scheme." (Appellee's Br. p. 91.) It may be asked, what evidence is there to show he joined the "scheme" before that time? The triers-of-fact had to look to all the circumstances to determine when Reisman became an active participant with a proprietary interest in the Gamble Ranch promotion, rather than merely the attorney for one of the active participants, defendant Benaron. In an effort to show Reisman's participation at all times named in the indictment, appellee has reported the evidence inaccurately.*

The prosecution goes so far as to imply in its argument that Reisman was a participant in the venture before October 13, 1959, even though the trial court ruled to the contrary in granting Reisman's motion for acquittal as to Counts II and III of the indictment. (See

*The testimony will not be quoted verbatim in the text, but will be reproduced as Appendix B to have complete citations in accordance with Rule 18(2)(d).

App. Op. Br. p. 137; Appellee's Br. pp. 91-92.) Since the government has not appealed from the judgment of acquittal as to Counts II and III, appellant will not argue Reisman's nonparticipation prior to October 13, 1959, except to point out that the testimony of B. M. Stewart does *not* indicate whether his meeting involving Reisman, Stewart and Clejan occurred in September 1959, (Appellee's Br. p. 91), or October or November, 1959, or any time before mid-December, 1959. [See R. T. 951.]

The testimony of Albert H. Allen was cited by appellee to prove the contention that Reisman was in close touch with the promotional activities of Allen and Clejan in October, 1959 (Appellee's Br. p. 91), a time when Reisman was traveling in Europe. [R. T. 12,942-12,944.] Closer inspection of Allen's testimony shows he refused to testify positively that Reisman was advised in October, 1959, of Allen's efforts on behalf of the venture. Allen testified that he did not have ". . . any independent recollection" of Reisman's whereabouts in October, 1959. [R. T. 1094.]

The testimony of witness Block of the Real Estate Commission does not establish that Reisman was acting on behalf of the Gamble Ranch venture in any meeting with Block before issuance of the original stop order on November 6, 1959. Block's testimony was only that Reisman came to see Block with Albert Allen but that Mr. Allen, not Reisman, actually appeared to be representing Clejan, then the promoter of Gamble Ranch. [R. T. 7150-7153.]*

Appellee inaccurately states that on *November 6, 1959*, Reisman, Benaron and Byrnes "met and dis-

*The pertinent testimony of Block is reproduced in Appendix B hereto, as number 1.

cussed the [Real Estate Commission's] 'stop order' . . ." (Appellee's Br. p. 92.) The record actually shows merely that Allen did not recall whether he himself saw the Real Estate Commission's stop order of November 6, 1959, *on that date,* because the "stop order" was not delivered to his office until late on Friday, November 6, 1959, and on Sunday he went to the hospital where he stayed for three weeks. Allen merely testified that he did discuss the "stop order" with Clejan (and perhaps with appellant Reisman), but it is clear from his testimony that this must have been some time after November 6, 1959,* and that he may never have discussed it with Reisman at all. [R. T. 997, 998, 999, 1009, 1010.]

Appellee states, ". . . Reisman conferred with water engineer Stetson in December, 1959." (Appellee's Br. p. 92.) Stetson's testimony is only that he may have spoken to Reisman on the telephone in January, 1960. [R. T. 10,000-10,001.]**

Appellee implies that Reisman's resignation as an officer and director in June, 1962, must be deemed "merely a formality" because S. Weiss was asked to assume the presidency of the Gamble Ranch Company under circumstances showing that *other* officers and directors continued to have an interest in the project. (Appellee's Br. pp. 92-93.) This is a distortion of the testimony. It is clear from the testimony cited by appellee that Reisman simply was no longer "in the picture" after June, 1962, that the only parties remaining behind the scenes were Benaron and Byrnes;

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*The pertinent testimony of Allen is reproduced in Appendix B hereto, as number 2.

**The pertinent testimony of Stetson is reproduced in Appendix B hereto, as number 3.

that Reisman took no further part of any kind in the activities which led to S. Weiss' appointment as President. [R. T. 4680-4683.]*

Appellee argues that the evidence proves Reisman was a participant in the "scheme" [Gamble Ranch venture] at all times named in the indictment. The evidence shows that before June, 1960, he acted only as an attorney, and had no proprietary interest in the company; that between December 1959, and June, 1960, though an officer and director he had no involvement in day-to-day business affairs of the company and no proprietary interest; that between June of 1960 and June of 1962, though still acting as an attorney, he also became somewhat involved in day-to-day affairs and had a proprietary interest. On such a record, it was improper to convict him of the counts specified in Appellant's Opening Brief, page 137, since there is no evidence of conduct of Reisman as a "principal" or financially interested party before June, 1960, and after June, 1962.

The cases cited in Appellee's Brief, pages 93-94, do not meet the point raised by these facts and appellant's citation of *Levine v. United States,* 383 U.S. 265, 15 L. ed. 2d 737, 86 S. Ct. 925 (1966). Appellant contends that the failure of the trial court to limit the evidence as to those counts before May 24, 1960 and after June 15, 1962, seriously prejudiced him as to the remaining counts, in that the failure of the court to strike the evidence and limit the proof permitted the jury to conclude, as was urged by the government, that appellant was a party to the scheme from the *first* to the *last mailing.*

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*The pertinent testimony of S. Weiss is reproduced in Appendix B hereto, as number 4.

V.

THE TRIAL COURT'S REFUSAL TO PERMIT APPELLANT TO EXAMINE THE GRAND JURY MINUTES BEFORE TRIAL DEPRIVED APPELLANT OF DUE PROCESS.

The government brief does not challenge appellant's argument that Criminal Rule 6(e) is unconstitutional. It merely points out that "Rule 6(e) . . . cloaks the transcript with secrecy." (Govt's Br. p. 94.) The government does not deny that it is fundamentally unfair to permit the prosecution to use the minutes while denying the accused that right. The government does not deny that appellant was unable adequately to prepare for this trial because he was not permitted to use the transcript. The government does not deny appellant's contention that the traditional reasons given for maintaining secrecy have no application after an indictment is returned. The government merely points to the Rule.

Appellant will not repeat arguments that are not disputed. The government is confident that this Court will preserve a policy of secrecy that is conceded by all to be unfair and unfounded.

Conclusion.

For the foregoing reasons the judgment of conviction should be reversed.

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Clarence S. Hunt,
Frederic G. Marks,
Joseph D. Mullender,
Anthony Murray,
Attorneys for Appellant.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

CLARENCE S. HUNT

APPENDIX A.

Transcript References Regarding Misconduct.

1. Colloquy regarding intimidation of Beatie [R. T. 1542-1548]:

"Mr. Rothman: . . . we have a long way to go in this trial with a lot of witnesses and if the Government is going to meet with each one—

The Court: Well, the Government will undoubtedly meet with each witness. They wouldn't put on a witness without knowing what they are going to testify to.

Mr. Rothman: I didn't finish—

The Court: I am sure you would do the same.

Mr. Rothman: I didn't finish the thought. That is correct, if your Honor please. I mean if they meet with the witnesses and suggest to them that if they don't testify in a certain way that certain things might happen to them, I suspect we are going to be running into some constitutional problems.

The Court: There is no question about that. Mr. Nissen, you are not threatening witnesses, are you?

Mr. Nissen: Your Honor, I would like to stand on the witness' sworn testimony and the testimony of the people in my office. I don't think I should be required to answer until somebody—

The Court: If the witness indicates from the stand that they have been threatened, I will strike their entire testimony.

Mr. Nissen: I am going to ask you first, your Honor, to hold a hearing to determine whether it is

so, because there were other people present besides myself and the witness.

I don't think the problem here—again we are having a problem raised that doesn't exist and it has happened throughout the trial and we don't think the court should take the time to go into it here. They can certainly do it with the witness on the stand.

The Court: Yes. You can cross-examine the witness on these things.

Is that all, now?

Mr. Hunt: I think not. I have not talked directly with Mr. Beatie, but I feel that from the conference I have had that there is an indication which is not cured by cross examination. If Mr. Nissen says he believes—he is perfectly willing there be a record made, I would not be averse to having Mr. Beatie asked if he would relate just what his conversation was and we find out what it was.

The Court: You can do that on cross examination.

Mr. Hunt: But, your Honor, the vice of that is that this is a matter which I feel goes to the very crux of the system of a fair trial.

The Court: I agree with you, Mr. Hunt.

Mr. Hunt: *We can't do it on cross examination for this reason: I think this is the time to find out what, if anything, was said by the Government. If there is nothing to it, that is the end of it. If there is something to it, then I think we should know it now.* (Emphasis supplied.)

Mr. Nissen: All right. If we are going to try what has been said to the witness we are going to

bring back the last three witnesses and ask what the defendants said to them in the hall during recess about changing their stories and refreshing their recollections, and so forth, which would be just as immaterial.

The Court: I think it is appropriate to proceed. You ask the witness anything you want on the stand. It will come out on the stand and be the record, and that will be it, and I will govern myself accordingly on instructions to the jury with respect to the witnesses. If necessary, we might have to hold some—

Mr. Hunt: I would like to make an offer of proof on what I am advised the facts are at this time for the record.

The Court: All right.

* * *

Mr. Hunt: That Mr. Beatie had a conference with Mr. Nissen—I believe Mr. Jacobson was there and I do not know who else was there—at which time Mr. Nissen stated in substance to Mr. Beatie that if he did not testify to the same things that he testified before the Grand Jury that the Government would take steps to take care of the situation. That is my offer of proof.

The Court: All right.

Mr. Hunt: Now, your Honor can see that if that is the circumstance and the situation, that is not an instruction or a request that a witness testify truthfully, because a witness may be mistaken. That is all I have to say at this time.

The Court: All right. He can explain that. Let's get the jury down and proceed."

2. Testimony and colloquy regarding insinuating questions asked Beatie:

The memorandum to Beatie referred to—Plaintiff's Exhibit 2-1017—states that a letter of Beatie to a San Diego television station refers to

> ". . . some ad-libbing to be done by one of the announcers. I am extremely concerned that something the announcer might say would not be in accordance with our wishes, and we might find ourselves in trouble with the land commission. I sincerely believe that any and all of the advertising we do should be canned commercials. By a copy of this letter I ask Ernie Beatie to instruct all of these radio and television stations to *only* use commercials approved by your office. There should be no deviation from these instructions." [R. T. 1510-1512, Govt. Ex. 2-1017.]

Later, Beatie was questioned as follows:

> "By Mr. Nissen: Q. With respect to Exhibit 2-1017, advising you by Mr. Benaron's memo that you must not ad-lib or ad-libbing must not be done, Mr. Rothman asked you, wasn't this before any investigation by the Post Office.
>
> Now, sir, to your knowledge, or were you advised by any of the defendants or any Gamble Ranch employee, or did you so advise them that in fact you were aware of Real Estate Commission and Better Business Bureau inquiries into land sales?
>
> Mr. Rothman: Your Honor, please, I make the same objection heretofore made, that it assumes facts not in evidence. For the same reasons I in-

dicate to the court I wanted to establish, I object to the question. I think it is highly improper.

The Court: No, I think it is all right so far. The objection is overruled.

* * *

Mr. Nissen: Q. Mr. Beatie, did the defendants in this case or any of their employees ever advise you they were aware of Better Business Bureau or Real Estate Commission investigation into land sales?

Mr. Hunt: Your Honor please, I don't understand that line of questioning. I object to it as highly prejudicial. It is misconduct.

The Court: He says he will connect it up.

* * *

Mr. Rothman: Your Honor please, it is going beyond my cross examination and, secondly, there isn't any showing nor will there by any that there was any knowledge on the part of these defendants there was any investigation.

Merely because counsel says he is going to tie it up is not going to cure the defect in this case when he can't tie it up to these defendants.

Mr. Nissen: *There is a document already in evidence, your Honor, which states as to carbon copies to all defendants that there are Better Business inquiries and so forth. It is already in.*

The Court: That is in evidence now?

Mr. Nissen: Yes.

The Court: From whom?

Mr. Nissen: Mr. Beatie.

The Court: To whom?

Mr. Nissen: The defendants named on the paper, your Honor. I believe Mr. Reisman, Mr. Benaron, Mr. Byrnes and Mr. Escarzaga.

The Court: All right. Objection overruled.

Mr. Hunt: From Mr. Beatie?

Mr. Rothman: I don't know what document they are referring to.

Mr. Nissen: *I can find it.*

The Court: *Find it at recess.*

By Mr. Nissen: Q. Do you recall that question so long ago, Mr. Beatie?

Mr. Beatie: A. No sir, I don't.

Mr. Nissen: Q. *Did any defendant here or any of their employees advise you they were aware of investigations into land sales either by the Real Estate Commission or the Better Business Bureau?* A. At what time sir?

Mr. Hunt: The court please,—

By Mr. Nissen: Q. Any time. A. Up until now?

The Court: You have made your objection. I overruled it.

Mr. Hunt: Any time up to now. Of course, he knows now.

By Mr. Nissen: Q. During the time you were employed by them to do advertising.

The Court: During the time you were employed to make up these commercials.

The Witness: I was aware there were inquiries through the Better Buriness Bureau, yes, sir.

The Court: Did the defendants tell you that?

The Witness: The defendants in this room, no, sir.

The Court: All right." [R. T. 1662-1665, Emphasis added.]

3. Further colloquy regarding insinuating questions asked of the witness Beatie:

"The Court [to Nisson]: You shouldn't ask a question unless you know what you are talking about.

Mr. Nissen: During the time Mr. Beatie was representing these people in advertising.

The Court: This is in January that he is talking about.

Mr. Nissen: I would have to get the letter, your Honor.

The Court: Be sure when you ask these questions, particulary—those are damaging questions to ask unless you are sure and you are able to show these things existed and the defendants knew about them.

Mr. Nissen: All right.

The Court: To ask him a question, 'Did they tell you something,' and then you don't know and you are not able to show that these things existed and that they knew about them isn't fair, in my judgment." [R. T. 1678.]

When the prosecutor failed to present such evidence defense counsel requested a cautionary instruction to the jury and the following occurred out of the presence of the jury:

"* * *

The Court: Is there evidence that there was any investigation by the Real Estate Commission or the Better Business Bureau in January 1961?

Mr. Nissen: No, sir, and our question asked nothing about that. We did not ask that.

The Court: Your question didn't specifically say that, but I think that was the import of your question, Mr. Nissen, so I have to clear it up. I have to clear it up.

If you have any evidence there was a Real Estate investigation—an investigation by any Real Estate Commission or Better Business Bureau being conducted—any investigation being conducted in January 1961, why, tell me.

Mr. Nissen: Yes, I would be happy to as soon as I locate the exhibit, your Honor.

The Court: All right. Then have it for me in the morning, what you are relying on and what you expect to prove, if you do, that there was investigation going on of the Gamble Ranch in January 1961 by any Real Estate Commission or the Better Business Bureau." [R. T. 1748-1749.]

APPENDIX B.

Testimony Regarding Dates and Times of Appellant Reisman's Participation in the Gamble Ranch Venture.

1. Testimony of Henry Block [R. T. 7150, line 2, to R. T. 7152, line 5]:

"Q. [by Mr. Hunt] Mr. Block, is it not true, sir, that after the stop order, as you call it, and which is a shorter name for the cease and desist order, after that order of November 6th was written and signed by you and delivered, is it not true that Mr. Reisman, after you had received further correspondence from Mr. Allen, you first saw Mr. Reisman in your office in which he told you he was representing Mr. Benaron and some others who were purchasing an interest in this property, and he was there at their request, isn't that true? A. My recollection is that I had seen him in the company of Mr. Allen prior to that time.

Q. Do you have anything in writing by way of correspondence, memoranda, notes, or anything to confirm your recollection, sir? A. Nothing other than my recollection. I recall it very vividly, sir.

Q. All right. You say you recall it very vividly. Do you recall having received a letter under date of November 9, 1959, from Mr. Allen relative to this matter? A. November 9, 1959, sir?

Q. Yes. A. I don't recall that, no, sir.

Q. I think I have a copy. I think it is a file, 1-238.

Mr. Reisman: B-2.

Mr. Hunt: B-2?

Mr. Reisman: B-2, yes.

Mr. Hunt: I have a copy here.

Q. It is a rather long letter from Mr. Allen. A. Yes, I recall this letter, sir.

Q. All right. Now it is true, is it not, sir, that you at no time prior to the receipt of that letter from Mr. Allen had any conversation with Mr. Reisman and Mr. Allen or Mr. Reisman, or Mr. Reisman with anybody else, in connection with this matter? A. To the best of my recollection before this letter was received we had had a visit from Mr. Allen and Mr. Reisman, sir, as described earlier.

Q. I invite your attention here to this copy of Exhibit 1-238, which is a letter under your signature, directed to Mr. Allen, Mr. Clejan, under date of November 10, 1959. A. Yes, sir.

Q. Do you see any reference in any of this correspondence at all to any conferences that you had had where Mr. Reisman was present? A. We wouldn't have noted them in the order to desist and refrain. As I indicated Friday, in the visit when Mr. Allen and Mr. Reisman came in, Mr. Reisman's relationship was not made known to me. I did not know whether he was an associate of Mr. Allen, a friend of Mr. Allen. I did not know why he came other than he appeared to take the position, as I understood it, that Mr. Allen on behalf of Mr. Clejan should complete the filing."

2. Testimony of Albert Allen. [R. T. 997, line 24, to 998, line 21; R. T. 999, lines 7-9, R. T. 1009, line 20, to 1010, line 15]:

"The Court: Mr. Allen, did you discuss any of these letters with Mr. Benaron or Mr. Reisman or Mr. Byrnes?

The Witness: I don't believe I did discuss the letter of November 13th and the letter of Novem-

ber 10, 1959. I am not certain that I saw it at that time or that I discussed it, because if I may explain, your Honor, the letter from the California Commissioner of Real Estate, dated November 6th, my recollection is it was delivered late on a Friday afternoon of November—which was November 6th, and I went into the Cedars of Lebanon Hospital, I believe, on the 8th November for surgery. And I didn't get back to the office again for a period of approximately three weeks, maybe three and a half weeks.

So I don't recall at this time whether I ever at that time saw these letters or not. I do recall the letter from the Commissioner of Corporations. I do not recall the response or the letter addressed to me of November 10th. If the November 10th—

The Court: What about the letter of November 6th, did you discuss that letter with these gentlemen?

The Witness: Yes.

The Court: Mr. Byrnes, Mr. Benaron, Mr. Reisman?

The Witness: Yes, sir.

The Court: 1-238 and 2-992 are ordered in evidence subject to the motion to strike.

(Documents marked Plaintiff's Exhibits 1-238 and 2-992 were received in evidence.)

The Court: All right

Q. [by Mr. Nissen] Sir, what was the discussion or the substance of the discussion that you had with Mr. Byrnes, Benaron and Reisman with regard to 1-237, the Commission's order?

* * *

To your knowledge, sir, was the matter of soil testing ever discussed with any of the four principals and, if so, at what time? A. I couldn't honestly say or recollect at this time whether such discussions did take place. I vaguely remember some reference to the letter, but I just cannot honestly state whether there was a general discussion concerning that.

Q. During your discussion as to how to answer the Commissioner's order, do you recall, sir, whether any of the four people we have been talking of mentioned an answer, an appropriate answer to that paragraph? A. There was a general discussion concerning the letter and the manner of answering it and the action that was to be taken. Primarily these discussions were, I believe, with Mr. Clejan, who was directly involved at that time as being the most substantial owner or investor in this venture. I think he was the one that was the prime mover, but I believe there was a general discussion concerning its contents and the method of answering it among all the parties."

3. Testimony of Thomas M. Stetson [R. T. 10,000, line 23 to R. T. 10,001, line 21]:

"Q. Now, those early meetings relative to your retention were with which members of the Gamble Ranch organization? A. Our initial meeting was with Mr. Clejan and I think Mr. Byrnes was at one or two of the meetings.

As I recall, prior to our initial report, those were the gentlemen that we had our dealings with. And Mr. Reisman—I am not sure whether we met directly with Mr. Reisman or talked to him by telephone.

But at least during the course of our study we did contact Mr. Reisman.

The Court: You mean before your initial report?

The Witness: No—I am not sure whether we had direct contact with Mr. Reisman before the report or at the time we were actually preparing the report and had presented the report.

In other words, I am not sure whether we met with Mr. Reisman before we went up into the field to make a field investigation.

The Court: Do you remember about when it was that you first had contact with Mr. Reisman?

The Witness: Well, it was about January of 1960."

4. Testimony of S. Weiss [R. T. 4680, line 23, to 4683, line 24]:

"Q. I believe, Mr. Weiss, you gave us the date upon which you took over duties as a vice-president and as a present.

Now, could you tell us, please, what individuals made you vice-president, sir, and if there was any conversation between you and these people about your taking that job? A. Yes, I was first asked by John Carey, who was then the president of Gamble Ranch, if I would become an officer, director of the Pacific Westates—I guess he was the president of the Pacific Westates.

I told him that I was not particularly inclined to because I knew there was an investigation going on and I did not want to be involved.

This was a few days prior to a meeting of stockholders and directors that was held by Pacific

Westates. And at that time I was asked to attend the meeting in which—at which were present several of the stockholders.

Q. Would you name them for us, please? A. Yes, sir.

There was Mr. Benaron and Mr. Byrnes. I don't believe Mr. Reisman was present.

Q. Anybody else? A. Yes, Mr. Rothman sitting at counsel table and Mr. Ross, Bert Ross, and I believe there were several other attorneys.

I could be mistaken about the name, but I think that Mr. Allen, Albert Allen was there.

It has been some time ago, but I think Mr. Finell of Mr. Rothman's office was there. I couldn't say for sure.

Q. What was the conversation, if any, about your taking an office in the Company? A. I was asked to take the office of Vice-president-director of the Company.

I restated my position, I knew there was a Federal investigation being conducted at the time and I didn't want to become involved in it.

They told me that I absolutely would not be involved and this was the unanimous consensus of the opinion and legal counsel of all the attorneys present.

I believe, if I recall, there were four or five attorneys present. They said they wanted me to serve as a caretaker or administrator because I knew people at the Ranch, running the Ranch, such as Mr. Mueller and the Blackwells handling the motel.

That they needed someone to handle the affairs of the Ranch and take care of it and see that the clients got up to the motel. They assured me on a number of occasions I would not be involved and I would be fully protected, and I really would be doing quite a service to all the clients, to continue on with this particular—if I would take the officership of the Company.

Q. After you had the vice-presidency, sir, you say you became president in about December '62? A. That is correct.

Q. Will you tell us, sir, what individuals. if any, requested you to take that particular office and who and what was said to you? A. I was asked to become president in December 1962. Mr. Benaron asked me if I would accept the presidency of the Company.

Some discussion was had relative to it. I was told that I was really needed very badly and that I was the only one that really knew anyone and had to continue on the Ranch operations, and that the clients really needed me as well as, you know, the Company itself.

That I was being put into a position that I would be doing them a grave disservice to resign—or not to accept the presidency at that particular time.

Q. Was there any discussion, sir, by Mr. Benaron as to why Mr. Reisman, Mr. Byrnes and Mr. Benaron were not willing to be president at that time? A. As I recall, there was some discussion that they had to resign. I guess probably because of this particular investigation. Apparently, it would not be satisfactory to have them continue."